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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

**GEORGIA MANOR WATER
ASSOCIATION,**

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,**

Respondent.

PCHB NO. 93-68

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

The Department of Ecology ("Ecology"), on May 26, 1994, filed a motion for partial summary judgment. The motion addressed the first issue from the Pre-Hearing Order, which was, "has Georgia Manor relinquished eight gallons per minute ("gpm") of its 20 gpm water right?" Ecology made it clear that it was not asking for a resolution of all the factual disputes related to all the related sub-issues. Rather, it sought partial summary judgment on the following questions:

- 1) whether Georgia Manor is exempt from relinquishment as its water right is a right for "municipal water supply purposes" under chapter 90.03 RCW?
- 2) whether the relinquishment statute, which was adopted in 1967, applies to Georgia Manor's right to divert or withdraw water, which dates back to 1962?
- 3) whether the Findings of Fact, Determination and Order, Docket No. DE 93WR-N157, is defective as it does not contain the information required by RCW 90.14.130?

The Pollution Control Hearings Board ("Board"), comprised of Robert V. Jensen, presiding; Richard C. Kelley and James A. Tupper, Jr., members, considered the following pleadings:

- 1) Ecology's Motion for Partial Summary Judgment;

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT
PCHB NO 93-68**

- 2) Ecology's Memorandum in Support of Motion for Partial Summary Judgment, including Appendices A-K;
- 3) Ecology's Note for Hearing;
- 4) Georgia Manor's Response to Respondent's Motion for Partial Summary Judgment, including Appendices A-G;
- 5) Ecology's Rebuttal Memorandum in Support of Motion for Summary Judgment, including Appendices A-D; and
- 6) Ecology's Amended Answer to Second Set of Requests for Admissions.

Having considered the arguments, we rule as follows:

I

There are no genuine issues as to material fact on the above issues. We first conclude that Georgia Manor is not exempt from relinquishment, on the ground that its water right is for "municipal water supply purposes under chapter 90.03 RCW." Georgia Manor conceded that it is not a municipal corporation. Deposition of Linnea Smith, p.8, lines 18-19.

II

RCW 90.03.260, requires that applications for municipal water supply, "give the present population to be served, and, as near as may be, the future requirement of the . . . We are unaware of any authority that equates a private water purveyor with a municipality. The fact that there are functions which can be carried out by both private and public entities, does not persuade us that the Legislature, in passing the Water Code, contemplated that private, non-profit corporations could obtain water rights for municipal water supply purposes. The Code draws a bright line between public and private entities. The distinction is not without reason. As this case illustrates, a private corporation may limit its customers, a remedy which is unavailable to a municipal corporation, which is obliged to accept as customers, whoever is within the boundaries of the municipality. Georgia Manor

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2 has done just that, to be able to continue serving its existing membership, with the limited
3 water it has.

4 III

5 Georgia Manor argues that because Ecology, has in the past, considered municipal
6 water supply providers to include other than municipal corporations; the Water Code should be
7 so interpreted. Although the legal interpretations of Ecology, as the agency administering the
8 Water Code, are entitled to deference (Department of Ecology v. PUD 1, 121 Wn.2d 179,
9 201, ___ P.2d ___ (1993)), they are not binding when they are at odds with the underlying
10 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). Here
11 the statute is unambiguous, thus the agency is without any authority to alter or amend the act
12 through its interpretations. Id.

13 IV

14 Georgia Manor next contends that application of the relinquishment statute to its water
15 right, constitutes an impermissible retroactive application of that statute. We conclude that
16 application of the relinquishment statute to Georgia Manor's water right, is limited to the
17 exercise of that right subsequent to the July 1, 1967 effective date of that statute. Thus if
18 Georgia Manor is ultimately deemed to have abandoned, without sufficient cause, a portion of
19 its water right, for any period of five successive years, subsequent to July 1, 1967, that portion
20 of the right would revert to the state. RCW 90.14.180; Francis Norman v. Department of
21 Ecology, PCHB No. 81-175 (1982).

22 V

23 There is no retroactive application of the law proposed. A retroactive
24 application would be to apply the statute to actions of Georgia Manor, in regard to the
25 failure to use its full water right, prior to July 1, 1967.

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2 VI

3 The certificate of water right was not issued until June 30, 1979, three years after the
4 effective date of the relinquishment statute. Consistent with that statute, the certificate states
5 that: "[t]his certificate of ground water right is specifically subject to relinquishment for
6 nonuse of water as provided in RCW 90.14.180."

7 VII

8 RCW 90.14.180 applies to "[a]ny person hereafter entitled to divert or withdraw waters
9 of the state through an appropriation authorized under RCW 90.03.330, 90.44.080, or
10 90.44.090 . . ." Georgia Manor argues that this means that the statute applies only to those
11 water rights authorized after July 1, 1967. That narrow reading of the statute would
12 effectively emasculate the express intent of the relinquishment statute, which is "to cause a
13 return to the state of any water rights which are no longer exercised by putting said waters to
14 beneficial use." RCW 90.14.010.

15 VIII

16 The better reading of RCW 90.14.180, and one which is consistent with the intent of
17 the relinquishment law, and the prior common law of abandonment, is that recognizes that the
18 right to withdraw water is only valid insofar as it is based on beneficial use. There is no
19 authority for the proposition advanced by Georgia Manor, that a water right permit vests the
20 holder with a right absent beneficial use. The contrary is true. "Permit holders have a vested
21 property interest in their water rights to the extent that the water is beneficially used."

22 Rettkowski v. Department of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993); Department of
23 Ecology v. Adsit, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985).

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2 IX

3 The relinquishment statute replaced the remedy of abandonment. This remedial
4 legislation, is not subject to the presumption against retroactivity; instead, the presumption
5 favoring prospective application is reversed. Haddenham v. State, 87 Wn.2d 145, 148, 550
6 P.2d 9 (1976). Thus, even if application of the relinquishment statute to Georgia Manor, to
7 the exercise of its right after July 1, 1967, were deemed retroactive, the application would not,
8 for that reason, be clearly improper.

9 X

10 Georgia Manor argues that the relinquishment statute requires, as does the common law
11 doctrine of abandonment, a showing of intent. The statute clearly omits any element of intent.
12 Instead, it utilizes the standard of causation. In other words, in order to avoid relinquishment,
13 a water right holder has to show that the failure to beneficially use the water was "without
14 sufficient cause." RCW 90.14.180.

15 XI

16 Georgia Manor next asserts that it was not provided with notice under the law of the
17 relinquishment action. This assertion is contrary to the facts. Ecology, on March 18, 1994,
18 issued its Report of Examination and its Findings of Fact, Determination and Order. The
19 order informed Georgia Manor

20 *that Ground Water Certificate No. 6897 will be declared partially*
21 *relinquished, unless within thirty (30) days of receipt of this*
22 *order, sufficient cause can be shown by you on appeal to the*
Pollution Control Hearings Board why said right should not be
declared relinquished.

23 This constitutes notice that Georgia Manor's water right was subject to relinquishment, under
24 RCW 90.13.130.

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2 XII

3 Finally, Georgia Manor contends that the above documents do not contain all the
4 specifics required in RCW 90.14.130. Ecology pointed out in its opening brief how the notice
5 satisfied all the elements of that statute. Georgia Manor did not argue the point, but rather
6 stated that it relied on the document itself. We have read the notice and statute and are
7 satisfied that the following specific information was contained in the notice, as required by
8 RCW 90.14.130:

9 *[a] description of the water right, including the approximate*
10 *location of the point of diversion, the general description of the*
11 *lands or places where such waters were used, the water source,*
12 *the amount involved, the purpose of use, and the apparent*
13 *authority upon which the right is based . . .*

14 XIII

15 Based on the above analysis, the Board enters this:
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2 **ORDER**

3 Partial summary judgment to Ecology, on issue 1 from the Pre-Hearing Order, is
4 granted.

5 DONE this 29th day of June, 1994.
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7 **POLLUTION CONTROL HEARINGS BOARD**

8 
9 ROBERT V. JENSEN, Presiding Officer

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11 RICHARD C. KELLEY, Member

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13 JAMES A. TUPPER, JR., Member
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